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ON KEEPING THE CIVIL JURY TRIAL

Peter H. Lousberg

I. Introduction

The civil jury in American jurisprudence has had a long and successful tradition. As a judicial tribunal,¹ it has reached out from the courtroom to take a cross-section of the community for its members, placing them at the heart of the administration of justice.² As a dynamic force it has shaped much of our law, accommodating and implementing social and economic development through eras as critical as our own—though the remote problems of ancestors printed on the pages of history seldom seem as urgent. In recent years, however, debate over whether the civil jury system can effectively continue to fill these important roles in contemporary society has resulted in a legalistic tennis match. At stake is the existence of the civil jury system itself. Observers must be ready to instantly turn their heads from the proponents to the opponents as arguments are smashed across the dividing line. While the advantage surges back and forth, employment of the civil jury continues. It is the purpose of this article not merely to give this author another serve in the match, but rather to evaluate some of the criticisms already made and to examine the prospects of resolving the controversy.

Supporters of the system look upon the individual juror's participation in the processes of justice as gainful experience for himself and society. It is asserted that the presence of the jury in the courtroom serves as a buffer between society and the judge, the personification of the strict letter of the law. These proponents also consider the civil jury a guarantor of integrity, reasoning that it is more difficult to influence twelve jurors than a single judge.

Critics of the system counter that it is unfair, economically and socially, to require a citizen to serve as a juror. They also claim that exposure to jury service disenchants the citizen while corroding competence in the administration of justice. The hard core of the criticism of the civil jury, however, consists of two general propositions: first, that the ordinary jurymen is not competent to handle complicated cases; second, that the system is objectionable because it is a source of economic waste.

* Member, Illinois Bar, American Trial Lawyers' Association; A.B., Yale University, 1953; LL.B., Notre Dame Law School, 1956; partner, *Moran, Klockau, McCarthy, Schubert & Lousberg*, Rock Island, Illinois.

1 Modern jurors are triers of fact. Jurymen at early common law were essentially witnesses called from the venire for their personal knowledge of the controversy. P. FRANCES, *HOW TO SERVE ON A JURY* 52 (1953).

2 The idea of employing the citizen in the administration of justice is neither new nor attributable solely to the Anglo-American system of jurisprudence. Aristotle, discoursing on the qualities of a citizen, recognized a value in utilizing him as an instrument of justice.

[T]he citizen whom we are seeking to define is a citizen in the strictest sense . . . and his special characteristic is that he shares in the administration of justice, and in offices.

He who has the power to take part in the deliberative or judicial administration of any state is said by us to be a citizen of that state; and, speaking generally, a state is a body of citizens sufficing for the purposes of life. ARISTOTLE, *POLITICS*, bk. III,

Those who voice the first criticism decry the juror's lack of expert knowledge. They claim that a juror is incapable of accurate judgments in complicated cases and that he is easily confused and bewildered by the use of conflicting expert opinions on issues of fact that are beyond his personal understanding.³ It is a fact that juries do try the more complex cases.⁴ This is only logical, since the very fact that a case is not settled and comes before a civil jury imports some note of difficulty in the case. Often complex liability or damage questions cannot be resolved by opposing counsel. They are then submitted to a jury for the solution that the parties could not reach. Such evidence as there is indicates that criticism of the civil jury's competence in handling complex cases is not valid. In a thorough empirical study of the jury system conducted by the University of Chicago Law School, some 4000 civil jury cases were analyzed.⁵ Although a final report has yet to be published, enough of this study has been revealed in other publications to refute those critics attacking the jury's competence.

Continuing their line of reasoning the critics say that a judge, replete with the qualifications of legal training and expertise derived from experience, would be better able than a jury to solve these otherwise insolvable controversies. Certainly a judge would be faced with the same complexities involved in the litigation as would a civil jury. As Professor Harry Kalven, Jr., one of the guiding forces behind the Chicago study, has said:

When one asserts that jury adjudication is of low quality, he must be asserting that jury decisions vary in some significant degree from those a judge would have made in the same cases. If he denies this and wished to include the judge, he has lost any baseline, and with it any force, for his criticism.⁶

On this premise, the Chicago study employed a test whereby the presiding judge would give his own "verdict" in jury cases. The presiding judge's conclusion was then compared with the verdict rendered by the jury. Analysis of the data gathered shows that the court and jury reached the same result in seventy-eight percent of the cases.⁷ This seventy-eight percent agreement between court and jury is certainly more than coincidental and weighs heavily in favor of the com-

3 Other critics contend that even if jurors are competent to decide a particular case, the cares of everyday life pressing upon the minds of individual jurors prevent them from giving their undivided attention to the case before them. Personal experience among lawyers who regularly try civil jury cases, however, supports the contrary conclusion. For the most part, jurors "are highly serious and responsible toward their task and toward the joint effort to deliberate through to a verdict." Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1062 (1964).

4 H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 63 n.11 (1966).

5 The Chicago study is the first far-reaching attempt to gain empirical knowledge from the participants in the civil jury trial. The study attempted to observe actual jury deliberation for source material. This resulted in a controversy over an invasion of the jury's privacy, and none of the information so obtained has been published. None of the information suppressed, however, is likely to undermine conclusions based on results of the study which have already been released. *Id.* at vi-vii.

6 Kalven, *supra* note 3, at 1063.

7 Disagreement between the court and the jury was experienced, therefore, in only twenty-two percent of the samples. In the area of disagreement the jury favored the plaintiff twelve percent of the time, while the judge favored him in the remaining ten percent. H. KALVEN & H. ZEISEL, *supra* note 4, at 63.

petency of the civil jury. In the area of court-jury disagreement, speculation remains as to whether any two judges hearing the same cases would have decided them in the same way. One need only count appellate court opinions to know that judges disagree. Human experience would indicate that in the twenty-two percent disagreement area, even two judges would differ.

Though the first general criticism of the civil jury system rests on a questionable foundation, the second proposition, that the civil jury is uneconomical, is difficult to deny. A sound estimate is that a jury trial takes approximately forty percent more time than a nonjury trial.⁸ This affects not only jurors, but attorneys, litigants and the courts as well. For it is well known that courts in many of the larger metropolitan areas in the United States are faced with a horrendous backlog of cases—many of them ordinary personal injury suits. Reported delays range from three months in the Superior Courts of San Francisco to over five years in the Circuit Courts of Cook County, Illinois.⁹

This formidable barrier to the efficient dispatch of justice has led some critics to propose abolishing the civil jury outright, at least in automobile accident cases, by the introduction of personal injury compensation plans which eliminate the necessity of trial by jury.¹⁰ These threats to the jury system are, in large part, attacks upon our system of fault-oriented jurisprudence itself.¹¹ The legal concepts of negligence, fraud, deceit, and defamation, to name but a few, depend upon a judgment of culpability. And because so much of the modern jury's justification depends upon its fault-finding function,¹² any resolution of the debate surrounding the civil jury requires a value judgment on

8 Kalven, *supra* note 3, at 1059.

9 Eighteen courts across the country reported delays of more than 30 months for the year 1966. *Court Congestion In Slight Decline*, TRIAL, Aug./Sept., 1966, at 8.

10 R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965); see also Keeton & O'Connell, *The Basic Protection Plan for Traffic Accident Losses*, 43 NOTRE DAME LAWYER 184 (1967). Keeton and O'Connell propose a plan that would retain trial by jury only where actual out-of-pocket expenses, not compensated by other sources, exceed \$10,000 and tort damages for pain and suffering exceed \$5,000. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 274-76 (1965). In arriving at their plan, Keeton and O'Connell discuss: the Columbia Plan (scheduled benefits); the Saskatchewan Plan (scheduled limited benefits); Green's Loss Insurance Plan (comparable to workmen's compensation except applicable to motor vehicle accidents); Ehrenzweig's "Full Aid" Insurance Plan (scheduled benefits). The plan which Keeton and O'Connell propose is unique in its recognition of the importance of offering compensation for pain and suffering. *Id.* at 441-44.

11 See Keeton & O'Connell, *The Basic Protection Plan for Traffic Accident Losses*, 43 NOTRE DAME LAWYER 184 (1967). In addition to eliminating liability based on fault, compensation plans would greatly modify the platform from which damages are derived. In none of the compensation plans except the one proposed by Keeton and O'Connell is pain and suffering a compensable item. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 441-44 (1965). Compensation would be largely limited to lost wages and medical expenses, a limitation that is highly questionable. As Jacob Fuchsberg has recently pointed out:

Pain and suffering, as an element of damages, has come to have a meaning embracing far more than its literal and traditional reference to man's sensitivity to physical pain and mental anguish. Under its umbrella, there has been gathered a host of consequential or additional losses, some difficult of more exact classification. Included are such realities as: the evaluation of specific injuries; impaired earning capacity (as distinguished from loss of earnings); destroyed activities of daily living loss of capacity to enjoy life and its relationships and what some scholars have termed loss of dignity.

Unless man does live by bread alone, these are vital. They are the intangibles of our way of life.

Fair recompense for such hardships was long in coming. The ideal of the law is *full justice*. Fuchsberg, "Basic Protection" or *Basic Justice?*, TRIAL, Feb./Mar., 1967,

our society's commitment to the idea of fault as a basis of liability. As one proponent of the civil jury system has stated, in discussing auto accident compensation plans,

[t]he reform is aimed not at the jury, but at the substantive criteria for determining what compensation, if any, accident victims are to receive. The serious arguments for substantive change would remain the same had the jury never been involved in these cases. The target of reform is the uneven incidence of common-law compensation. Further, the hope of such proposals is not simply to do away with jury trials but to make any trial unnecessary.¹³

II. Constitutional Considerations

Those who would abolish, or substantially restrict, the civil jury face formidable, though not insurmountable, constitutional barriers. While the seventh amendment guarantees the right to trial by jury in civil lawsuits in federal courts, it does not compel the states to do the same.¹⁴ Most states, however, do guarantee a right to trial by jury in civil cases, though constitutional provisions vary widely. In those jurisdictions that constitutionally guarantee trial by jury in such cases, direct legislative attempts at abolition would undoubtedly fail. Any direct attack would have to follow the route of constitutional amendment.

Advocates of the proposed plans for automobile accident compensation use a more subtle approach. They base the validity of their plans on the legislature's ability to circumvent constitutional requirements of civil jury trials and find ample precedent for this indirect approach in the history of the workmen's compensation legislation. In this legislation, two approaches were used to skirt the constitutional obstacle of the right of trial by jury. One method was to make the compensation plan elective, so that anyone who elected to proceed under the statutory remedy waived, at least implicitly, his right of trial by jury. Under the second approach coverage was compulsory, but the abolition of the right of trial by jury was sustained as an exercise of the state's police power to replace or abolish an entire cause of action.

The experience of Illinois serves as a good illustration of both theories.¹⁵ That state's first workmen's compensation statute was construed to be elective

12 Discussing a plan for the elimination of jury trials and the concomitant abolition of the fault theory, Franklin J. Marryott stated that

to make a valid evaluation, the plan seems to call for too gigantic a step. It lacks the "awkward poetry of the involved." Its logic seems too unmitigated by long exposure to the glare of life as it is in the actual workings of the present system. It is not the sort of modification or improvement of the automobile tort system that can be taken in stride by the Bar, the insurance companies, the courts or the general public. Marryott, *The Tort System and Automobile Claims: Evaluating the Keeton-O'Connell Proposal*, 52 A.B.A.J. 639, 643 (1966).

13 Kalven, *supra* note 3, at 1057.

14 U.S. CONST. amend. VII. *E.g.*, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Edwards v. Elliott*, 88 U.S. 532 (1874); *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Olesen v. Trust Co.*, 245 F.2d 522, 524 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957).

15 Illinois will be referred to throughout this article. The author believes that its experience epitomizes many of the problems which the civil jury system faces today. Illinois is further exemplary in that it has recognized these problems and has attempted to solve them.

in *Deibeikis v. Link-Belt Company*.¹⁶ In that case, the Illinois Supreme Court sustained the validity of the statute with this language:

Were the act deprived of its elective feature and made compulsory upon every employer and employee . . . very different and more serious questions would be presented. . . . While the right of trial by jury is guaranteed under our constitution, it is a right that anyone may waive if he shall see fit, and by electing to come within the provisions of the law an employer or employee elects, in the first instance, to submit any dispute that may arise to a board of arbitrators without the intervention of any court or jury.¹⁷

When subsequent amendments made the workmen's compensation program compulsory, the court shifted its ground but upheld the statute, saying:

Our constitution provides that the right of trial by jury as heretofore enjoyed shall remain inviolate, but it guarantees that right only to those causes of action recognized by law. The act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with the cause of action in any case exists at all in the exercise of the police power of the State, then the right of trial by jury is therefore no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the latter is to leave the former nothing upon which to operate.¹⁸

By using the rationale adopted to uphold workmen's compensation legislation, fixed compensation plans in automobile accident cases would have a smooth road to constitutional validity because of the state's power to control its highways. For when individuals use the roads, they do so by way of a privilege granted by the state. It is then but a simple step for the state to set up conditions to that privilege. In fact, the compensation plan which is currently receiving the most attention, the Keeton-O'Connell Basic Protection Plan, depends in part on this rationale.¹⁹

Those advocating the outright abolition of the civil jury really have but one avenue open to them, eradication by constitutional amendment. And the possibility of that happening must be termed slight. The advocates of indirect change, however, might well be able to achieve their objectives without constitutional amendment. In a sense, this situation is unfortunate, for advocates of direct abolition would, of necessity, present to the electorate the question of whether the jury should continue deciding accident cases. The advocates of the auto-

16 261 Ill. 454, 104 N.E. 211 (1914).

17 *Id.* at 465-66, 104 N.E. at 216.

18 *Grand Trunk W. Ry. v. Industrial Comm'n*, 291 Ill. 167, 176, 125 N.E. 748, 751-52 (1919). See also *Moushon v. National Garages, Inc.*, 9 Ill. 2d 407, 137 N.E.2d 842 (1956); *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952) (discussing the history of the legislation in Illinois from the elective position to the compulsory position).

19 That plan envisions substituting for most of the automobile accident cases a complicated series of compulsory and elective insurance benefits. Legislative action would impose a basic insurance protection program upon the owner and operator of a motor vehicle. The program has, as a condition precedent, the acceptance of certain prescribed benefits. Without the insurance, the motorist could not operate his motor vehicle in the state.

mobile compensation plan would not give the voter this choice but would make their appeal to the legislatures of the various states.²⁰

III. Modernizing the Civil Jury Trial

Although there is some merit in the criticism of the civil jury trial, the solution is certainly not abolition of the jury. For the prospects of change by abolition of the civil jury trial are either remote, impractical or undesirable. What, then, can be done? The solution, according to Justice Tom C. Clark, recently retired from the United States Supreme Court, is to "try other methods and techniques to modernize and streamline the system."²¹ Many innovations, some still under study, others which are already in use, demonstrate that change and modernization to meet present needs are possible within the civil jury system. The more important methods and techniques of improving and revitalizing the system can be better discerned by dividing the civil jury trial into three parts: the period during which the jury is constituted; the time of preparation for the jury trial; and the time of the trial itself.

A. Constituting the Civil Jury

Many different devices have been employed in the selection and summoning of juries, with practices varying from jurisdiction to jurisdiction. While the right to have a jury lawfully selected is substantial, and justice requires it not be denied, no one method of selection is constitutionally required.²²

1. The Jury Commission

Under earlier practice, selection of veniremen was a mechanical process. Little, if any, effort was made to screen jurors in advance. The question of their qualifications was left to the attorneys at time of trial on *voir dire* examination. Critics concluded, with some merit, that such a system is haphazard and time consuming. It places a time burden on the court, jurors, attorneys and litigating parties. This burden can be relieved and a great improvement in quality achieved simply by not calling unqualified persons to act as jurors. Thus, the jury commission system was devised to weed out incompetents from potential jurors.

The introduction of the commission was met with constitutional objections based on an asserted deprivation of the right of trial by jury. The courts, however, stressing the economy of the commission system, have upheld its constitutionality.²³ Today, jury commissioners are used to summon and select jurors

20 TRIAL, Apr./May, 1967, at 5 (reports the action of the Massachusetts Legislative Insurance Committee).

21 Clark, *The American Jury: A Justification*, 1 VALPARAISO L. REV. 6-7 (1966).

22 *People v. Dunn*, 157 N.Y. 528, 52 N.E. 572 (1899); *People ex rel. Henderson v. Onahan*, 170 Ill. 449, 48 N.E. 1003 (1897).

23 *People ex rel. Lasecki v. Traeger*, 374 Ill. 355, 29 N.E.2d 519 (1940); *People v. Bain*, 358 Ill. 177, 193 N.E. 137 (1934); *People ex rel. Henderson v. Onahan*, 170 Ill. 449, 48 N.E. 1003 (1897).

in at least thirty-four jurisdictions,²⁴ and the trend appears to be toward their wider use.

The jury commission employs pre-selection questionnaires for prospective jurors. A citizen summoned to jury duty, upon reporting to the commission office, receives a set of questionnaires that investigates his background. The investigation covers the statutory qualifications and determines if he possesses sufficient qualities of intelligence, experience, and education to be a satisfactory juror.²⁵ Pre-selection investigation of jurors may be even more intensive. California, for example, employs a system of investigation authorizing a combination of personal interviews, written examinations, questionnaires and intelligence tests.²⁶ There is a danger, however, in being too exclusive in the standards of acceptance. If an actual community standard is to be sought in the adjudication process, pre-selection should not be so restrictive that only a small segment of the community is represented in the end product. Care in establishing guidelines for the commission's selection of jurors is essential.²⁷

In 1962, the Illinois Judicial Council studied the feasibility of wider use of the jury commission system. Its report, coming down decidedly in favor of the system, stated:

It was the opinion of the Committee then that a more representative class of juror was produced under the Commission System, that the Commission System avoided a continued duplication of members of Grand Juries, that it avoided the continued presence of old and retired persons as members of Petit Juries who had been selected by members of the Board of Supervisors in payment of small political obligation, that under the Commission System jurors could be selected to serve at particular seasons of the year which did not interfere with their occupations and employment, that the citizens of the county generally under the Commission System had the greater opportunity to serve on juries, that physically unfit persons were eliminated by the Commission before they were called as jurors, and that a Commission produced a more truly representative class of persons for service.²⁸

Where it has been adopted, the jury commission system works effectively and economically. It has been endorsed and recommended for areas where it is not used. Most importantly, if it is employed as a selection method, the result is an interested and experienced juror of higher caliber.

2. Jury of Less Than Twelve

Regardless of the method of jury selection, there will be significant benefits in efficiency and economy if the number of jurors can be reduced. Traditionally there have been twelve jurors, but must this be so? At the outset, it must be

²⁴ A. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 185 (1949).

²⁵ *Id.* at 183.

²⁶ CAL. CIV. PROC. CODE § 204(c).

²⁷ See Fuchsberg, *Democratizing the Jury*, TRIAL, June/July, 1967, at 3. See also P. FRANCES, *HOW TO SERVE ON A JURY* (1953), for a study of statutory standards relating to qualifications for jury duty.

²⁸ ILL. JUD. CONF. REP. 107. Illinois, in 1967, widened the use of the jury commission.

admitted that constitutional problems can abound in an attempt to reduce the size of juries. Very often, any attempt to try a case before a jury of less than twelve would be unconstitutional. Again Illinois can serve as an example. Its constitution requires a jury of twelve in all cases except those tried before a Justice of the Peace.²⁹ In spite of this constitutional provision, however, Illinois has been conducting an interesting experiment in the use of less than twelve jurors in the civil system. Although, the Illinois Constitution provides the right to a jury trial by twelve jurors, a litigant can, of course, waive that right.³⁰ Under this concept, parties before the municipal court of the City of Chicago may waive the jury of twelve for the opportunity for trial by six jurors. The jury fee for trial by six is fifty dollars; the fee for a jury of twelve is one hundred dollars. Thus, the party electing to demand trial by jury, whether it be plaintiff or defendant, is forced to make an economic as well as a tactical judgment. If the fifty dollar fee is paid, the party is held to have elected a trial by a jury of six.³¹ The 1967 Illinois legislature expanded this concept to cases throughout the state not exceeding \$10,000.

The economy of a trial by a jury of less than twelve extends considerably beyond the mere saving of fifty dollars, however. The time required for the trial itself is lessened substantially. For the number of jurors initially called is reduced, and time spent on *voir dire* is decreased. The Illinois Judicial Conference concluded that the following benefits resulted from using a six man jury:

- (a) There is the obvious saving of jury man power.
- (b) It required approximately 40% less judge and lawyer time to select a jury of six compared to a jury of twelve.
- (c) There are financial savings of jury fees, food, records, bailiffs, clerks and other supporting personnel.
- (d) There are space savings because the physical facilities for six man juries and its supporting personnel need be less extensive.

29 The right of trial by jury as heretofore enjoyed shall remain inviolate; but the trial of civil cases before Justices of the Peace by less than twelve men may be authorized by law. ILL. CONST. art. 2, § 5.

In *Liska v. Chicago Railways Company*, the Illinois Supreme Court stated: The right of trial by jury constitutionally guaranteed is the right as it existed at common law and as it was enjoyed at the time of the adoption of the present constitution. It is the right to have the facts in controversy determined . . . by twelve impartial jurors who possess the qualifications and are selected in the manner prescribed by law. 318 Ill. 570, 583, 149 N.E. 469, 476 (1925).

30 Constitutional prohibitions against using less than twelve jurors have been met in other states in various ways. Some states amended their constitutions to do so. Other state constitutions have provided initially for a trial in civil matters by less than twelve jurors. For example, New Jersey's Constitutions states:

The right to trial by jury shall remain inviolate; but the legislature may authorize the trial in civil causes by a jury of six persons when a matter in dispute does not exceed Fifty Dollars. N.J. CONST. art. 1, § 9.

Idaho has a similar provision which sets the jurisdictional limits at five hundred dollars. IDAHO CONST. art. 1, § 7. Utah's Constitution provides, except in capital cases, that a jury shall consist of eight persons and in courts of inferior jurisdiction of four persons. UTAH CONST. art. 1, § 10. The Federal Rules of Civil Procedure permit the parties, by stipulation, to submit the issues to a jury of less than twelve. The Rules make no attempt to prescribe how many jurors must be used (or indeed what percentage of the jurors hearing the case must agree on a verdict). FED. R. CIV. P. 48. This is about the only means that could be employed in view of the seventh amendment.

31 See *People ex rel. Flanagan v. McDonough*, 24 Ill. 2d 178, 180 N.E.2d 486 (1962); *Huber v. Van Schaack-Mutual, Inc.*, 368 Ill. 142, 13 N.E.2d 179 (1938). The rationale was that the cost for a jury is reasonable and no different from a fee required for services by other public officials.

(e) Most importantly, in the thoroughly considered opinion of the judges with experience in depth with the use of a six man jury, the *plaintiffs and defendant receive as good composite justice from a six man jury as they do from a twelve man jury.*³² (Emphasis added.)

The Conference also reported that even before the imposition of the fee differential between a jury of six and a jury of twelve, the demand for six man juries ran three to one over the demand for twelve man juries. They further report, though citing no statistics, that since the imposition of the fee differential, the demand for six man juries has risen substantially above the three to one ratio.³³

A civil jury of less than twelve has much to recommend it. It is a time saver. Yet it retains the desirable qualities of a trial of factual issues by a jury of laymen rather than by a panel of experts or the judge alone.

3. Alternate Jurors

In constituting a civil jury, some jurisdictions authorize one or two extra jurors as alternates.³⁴ The Federal Rules authorize up to six alternate jurors.³⁵ These additional jurors are chosen after the jurors who are actually going to render the verdict. They are subject to the same *voir dire* examination and recite the same oath as the jurors actually selected to sit. The additional or alternate jurors then hear the evidence and take part in the entire jury trial until the point of deliberation.

The purpose of additional or alternate jurors is to preserve a jury's time. In the event that one of the regular jurors becomes ill or must be excused by the court, the legally required number of jurors can still be instructed and retired to the jury room to reach a verdict. Thus, if two or three days of trial have taken place before a juror is excused, this time is not lost to the court and jury. An alternate juror merely steps into the absent juror's place.³⁶ A provision for alternate jurors, then, is a relatively inexpensive expedient to insure that a jury's expenditure of time is not wasted.³⁷

4. Less Than Unanimous Verdicts

Hung juries have been a small but nonetheless troublesome source of delay in the civil jury system. For the calendar year 1965, the various trial courts throughout the State of Illinois reported 3,754 law jury cases to the court administrator. Of that number, only 25 cases resulted in mistrials because of jury disagreement. However, these 25 cases accounted for a loss of 174 "jury one-half days." These lost jury half-days also meant lost half-days by the judges

32 1962 ILL. JUD. CONF. REP. 64.

33 *Id.* For authorities on constitutionality, see Annot., 32 A.L.R. 865 (1924).

34 *E.g.*, ILL. REV. STAT. ch. 110, § 66(2) (1956).

35 FED. R. CIV. P. 47(b).

36 The federal position, allowing six alternates, is a result of experience with the more lengthy cases, which proved two alternates to be inadequate. See FED. R. CIV. P. 47(b) (notes of advisory committee on rules).

37 Annot., 84 A.L.R.2d 1288 (1962).

plus, the report indicates, four additional half-days lost by the judges.³⁸ In 1964, out of 4,229 cases reported, only 43 resulted in mistrials because of jury disagreement. These 43 cases, however, resulted in a loss of 252 jury and judge half-days, with an additional 22 lost half-days by the judge.³⁹ The Illinois Judicial Conference reported 19 jury disagreements, constituting 88½ lost days for both judge and jury, in the Circuit and Superior Courts of Cook County for the period between August 1961 and March 1962. There were 241 law jury verdicts in those courts during the same period. Thus, the hung jury cases constituted 8 percent of the law jury verdicts. Considered this way, the problem of the hung jury assumes considerable significance.⁴⁰

The solution for the deadlocked jury is, quite logically, a less than unanimous verdict. The idea is not novel, for eighteen different jurisdictions already permit less than unanimous jury verdicts in civil matters.⁴¹ Granting that the requirement of unanimity should be set aside, one must next determine what proportion of the jury need agree before a verdict can be rendered. In answering this question, it should be noted that the requirement of a unanimous verdict inherently leads to deliberation. Thus, the lower the percentage of jurors required to return a verdict, the less assurance there is of adequate deliberation. It is obvious that a simple majority is not desirable. Under such a rule, no assurance would exist that the jury would in fact deliberate the case. A jury could retire to the jury room, take an immediate vote and report a simple majority verdict.⁴² Concededly, this could occur where a unanimous verdict is required, but the probabilities are far less.

Jurisdictions permitting a less than unanimous verdict employ various standards for insuring adequate deliberation and an exchange of ideas by the jurors. Minnesota, for example, requires that a jury deliberate not less than six hours before permitting a verdict by only five-sixths of the jury members.⁴³

Where the state constitution permits a verdict by a less than unanimous vote, legislatures are free to implement the device. Absent an express provision, however, constitutional barriers are acute. In Illinois, as a case in point, the right to civil jury trial is guaranteed as "heretofore enjoyed."⁴⁴ The 1962 Judicial Conference in Illinois concluded that "no positive or persuasive reason is found in the histories for either the requirement of precisely twelve jurors or

38 ADM. OFF. OF ILL. CTS. ANN. REP. 57 (1965).

39 ADM. OFF. OF ILL. CTS. ANN. REP. 84 (1964).

40 1962 ILL. JUD. CONF. REP. 65. See also Kalven & Zeisel, *The American Jury*, 48 CHICAGO BAR RECORD 195, 200 (1967), where the authors' study of criminal cases showed 5.6 percent hung juries in states which required unanimity and 3.1 percent where a majority verdict was acceptable.

41 1962 ILL. JUD. CONF. REP. 66-69. The states are Arkansas, California, Idaho, Kentucky, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and Wisconsin. This concept in criminal matters assumes an entirely different set of values. For a critical analysis of recent English legislation abolishing unanimous verdicts in criminal trials, see Kalven & Zeisel, *supra* note 40.

42 Apparently no jurisdiction permits a verdict by simple majority. Required proportions run generally from two-thirds of the jury to five-sixths.

43 The right of trial by jury shall remain inviolate . . . and the legislature may provide that the agreement of five-sixths of any jury in any civil action or proceeding, after not less than six (6) hours' deliberation, shall be a sufficient verdict therein.

MINN. CONST. art. 1, § 4.

44 ILL. CONST. art. 2, § 5.

for the requirement of unanimous verdicts."⁴⁵ But the conference conceded that the constitutional situation in Illinois is probably fatal. The Indiana Supreme Court held a statute authorizing less than unanimous verdicts unconstitutional.⁴⁶ Its constitutional provision, similar to that of Illinois, was interpreted to require a civil jury of twelve jurors and a unanimous verdict because these were the requirements which existed prior to the adoption of the Indiana Constitution.⁴⁷

Assessing the value of a less than unanimous verdict, the concept shows up favorably. The Illinois Judicial Conference so strongly favored the idea that it recommended legislative enactment of the less than unanimous verdict in civil cases, immediate court testing of the legislation, and, in the event the statute was declared unconstitutional, an amendment to the Illinois Constitution.⁴⁸ Ironically, in matters of law, where each decision can have much greater importance as precedent, our jurisprudence permits a simple majority of judges on a reviewing court to declare what the law is. Their declaration may continue a broad legal concept in existence or may change it radically: Yet, unanimity is not a prerequisite, not even in constitutional matters. When, however, a factual dispute is being considered by a civil jury, or the jury is asked to judge the conduct of a litigant, nothing less than a unanimous verdict satisfies the dictates of justice. This juxtaposition demonstrates a basic illogic.

B. Pre-Trial Matters

The methods of pre-trial preparation do not apply solely to the civil jury system, but are appropriate for bench trials as well. However, their existence came about largely because of pressures generated in the civil jury field. Preparation for trial by civil jury has undergone a marked change in the past twenty years. Today discovery procedures, consisting of depositions, interrogatories, motions to produce documents and tangible objects, requests for admission of genuineness of documents or admissions of facts, the use of independent medical experts, certificates of readiness and the pre-trial conference, are fruitfully employed toward the preparation of trial or achieving settlement of cases. The growth in the pre-trial stage of litigation gives the impression of time-lapse photography — the experimentation, use and development of the devices growing before the observer's eyes. Pre-trial practice has moved rapidly from the closed fist, poker player, adversary attitude to the open file, no bluffing, "let's get the facts" approach.

1. Discovery

The Federal Rules of Civil Procedure provided the impetus for the enlightened change in the pre-trial field. A comparison of commentaries on pre-trial discovery before the adoption of the Rules and commentaries written afterwards amply illustrates that the "game" aspect of federal civil litigation should be

45 1962 ILL. JUD. CONF. REP. 70.

46 *W. T. Rawleigh Co. v. Snider*, 207 Ind. 686, 194 N.E. 356 (1935).

47 *Id.*

48 1962 ILL. JUD. CONF. REP. 71.

over. The "game" aspect has been replaced by such effective tools as the discovery deposition, written interrogatories and the discovery of tangible objects and documents, which give counsel a more informed platform on which to base a judgment and evaluate his case.⁴⁹ The backlog of civil jury cases should be reduced simply because fewer cases will reach the trial stage.

The liberality of the discovery procedures permitted by the Federal Rules has been established for some time.⁵⁰ The Rules permit inquiry

regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including . . . the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial⁵¹

Interrogatories may relate to any matters which may be inquired into by deposition.⁵² Rule 34, allowing discovery of documents, has been extended to permit counsel to discover statements of witnesses taken by the opposition. And although a showing of "good cause" is technically required, some cases seem to accept any showing as satisfying that prerequisite.⁵³

Many states closely follow the Federal Rules relating to discovery and the liberal concept behind those rules. Thus, many discovery systems require the revelation of names of occurrence witnesses.⁵⁴ Such a rule permits a full investigation by both sides prior to trial. Similarly, discovery of whether a defendant in a civil action has insurance covering his potential liability is permitted in many jurisdictions.⁵⁵ In *People ex rel. Terry v. Fisher*,⁵⁶ the Illinois Supreme Court required defendants to reveal the existence and amount of liability insurance. After reviewing the conflict among various jurisdictions with regard to this matter, the court placed Illinois among those jurisdictions requiring disclosure of insurance and made these comments on discovery procedures:

They were adopted as procedural tools to effectuate the prompt and just disposition of litigation, by educating the parties in advance of trial as to the real value of their claims and defenses. As noted by legal scholars, those rules will suffice for present needs if lawyers and judges will use them with an understanding of that purpose. . . .

In the light of this approach, we must reject at once as authority those cases limiting pretrial discovery to matters admissible in evidence . . . as being contrary to both the terms and intent of the Rule.⁵⁷

The decision in *Terry* merely followed the trend, announced in *Krupp v. Chicago Transit Authority*,⁵⁸ requiring disclosure of the names of occurrence

49 FED. R. CIV. P. 26.

50 See *Hickman v. Taylor*, 329 U.S. 495 (1947).

51 FED. R. CIV. P. 26(b).

52 FED. R. CIV. P. 33.

53 *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Johnson v. Ford*, 35 F.R.D. 347 (D. Colo. 1964).

54 FED. R. CIV. P. 26(b).

55 Annot., 41 A.L.R.2d 968 (1955).

56 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

57 *Id.* at 236-37, 145 N.E.2d at 592.

58 8 Ill. 2d 37, 132 N.E.2d 532 (1956).

witnesses.⁵⁹ The new Illinois Supreme Court Rules, effective January 1, 1967, take another important step towards broader discovery. Those rules define the scope of discovery as follows:

Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the parties seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts. . . .

All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.⁶⁰

This language assumes even greater liberality when viewed in light of *Monier v. Chamberlain*,⁶¹ decided by the Illinois Supreme Court at the same time the court was preparing its new rules on discovery. That case permits opposing parties to obtain copies of statements of witnesses taken by an adversary without the prerequisite of "good cause" which is required under the Federal Rule.⁶²

Thus, about the only things remaining beyond the reach of opposing counsel using the modern discovery methods are privileged statements from clients and, at least for the time being, statements of nonoccurrence witnesses such as experts. The logical end of this whole trend towards broader discovery, when viewed with the objective of relieving court congestion, is to establish a system of "pre-suit" discovery. Such a system would allow claimants who intended ultimately to file suit to have limited discovery even before they file suit, upon their giving an appropriate notice.⁶³ Of course, safeguards would have to be erected to prevent abuse, but that should not be considered an insurmountable obstacle to this type of discovery. In evaluating the merits of such "pre-suit" discovery it should be noted that discovery does lead to a more accurate evaluation of contending claims, with a correspondingly greater number of settlements.

59 The Supreme Court of Illinois said in that case:

By its enactment . . . the General Assembly showed its purpose to broaden substantially the scope of available discovery. It acted in response to prevailing dissatisfaction with procedural doctrine which had exalted the role of a trial as a battle of wits and subordinated its function as a means of ascertaining the truth. The doctrines which thus unduly emphasized the adversary quality of litigation originated in judicial decisions, some of which, indeed are pressed upon us by the defendant. . . . The hostile attitude toward discovery which sired those decisions was rejected by the General Assembly in the Civil Practice Act. "Discovery before trial" presupposes a range of relevance and materiality which includes not only what is admissible at the trial, but also that which leads to relevance at the trial. *Id.* at 41,

132 N.E.2d at 535.

60 ILL. SUP. CT. R. 201(b)(1), (2).

61 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

62 *Id.* at 359-60, 221 N.E.2d at 416-17.

63 Such a rule might require the filing of a notice for discovery with the clerk of the court on a special docket for a minimal fee. The notice would be comparable to that used for depositions to preserve evidence before suit is filed.

If court congestion is as great a problem as contended by the critics of the civil jury system, then the idea of a "pre-suit" discovery system makes sense. And the trend toward broader discovery is flexible enough to encompass such an innovation.

2. Independent Medical Examinations

Another pre-trial method of cutting down the case backlog is the increased use of independent medical experts in personal injury jury cases. Medical issues in personal injury cases are generally time consuming and confusing to a jury. They are made more so by the usual method by which medical evidence is presented. For each side presents its own "expert," with each "expert" presenting his own diagnosis or prognosis. When the testimony conflicts, the jury is left to weigh the truth of the statements and to wonder about the impartiality of their proponents.

Very often these conflicts between examining doctors might be bridged through the give and take of pre-trial negotiation. To facilitate this bridge building, some jurisdictions have adopted an independent medical examination rule. The essence of such a rule is that a party whose medical condition is in issue is required to submit to a medical examination by a doctor appointed by the court.⁶⁴ While the particulars of the rules adopted in various jurisdictions may differ,⁶⁵ the philosophy behind them is the same. Their purpose is to simplify the jury's and the court's burden by removing the element of bias present in a partisan approach to presenting medical testimony. The independent medical examination provides a common ground for the meeting of plaintiff and defendant. Even if its use does not bring about a settlement, it will prove to be of assistance to the jury at trial by providing an impartial perspective from which to judge the medical situation.⁶⁶

64 Such an examination is to be distinguished from that provided for in the various practice rules which give a party to a law suit the right to have his doctor examine the opposing party. For example, the Illinois Supreme Court Rule says that the court may upon motion "order the party to submit to a physical or mental examination by a physician suggested by the party requesting the examination" ILL. SUP. CT. R. 215(a). The independent medical examination rule, on the other hand, reads:

The court may on its own motion or that of any party order an impartial physical or mental examination of a party whose mental or physical condition is in issue, when in the court's discretion it appears that such an examination will materially aid in the just determination of the case. The examination shall be made by a member or members of a panel of physicians chosen for their special qualifications by the Illinois State Medical Society. ILL. SUP. CT. R. 215(d).

65 For example, the administrative duties often lie with different persons. New York uses a special deputy clerk, while Illinois uses a court administrator. Cuyahoga County (Rule 21 A, of the Cleveland Courts,) uses an impartial medical expert plan restricted to pre-trial stages. The Illinois plan requires payment to be assessed by the court from a special fund or taxed as costs. The federal courts require the litigants to pay the fees.

66 No statistics are available in any of the jurisdictions currently using the independent medical examination plan to show how often it is being used. Experience in the use of the plan in Illinois varies widely from circuit to circuit. In any event, it is being accepted slowly. ADM. OFF. ILL. CTS. ANN. REP. 67 (1964). The rule in Illinois became fully implemented on January 1, 1964, in Cook County. As of July 15, 1965, only 57 cases had employed the rule. The concept is deserving of greater use.

3. Pre-Trial Conferences

A pre-trial technique with great potential for effecting a more efficient disposition of jury and potential jury cases is the pre-trial conference.⁶⁷ For the pre-trial conference is becoming more diversified in its use and also more effective.⁶⁸ Again, the Federal Rules have lent the greatest impetus to the acceptance of this device. Rule 16 provides for a pre-trial conference at which the court may delve into such matters as the simplification of issues, amendments to pleadings, admission of facts and genuineness of documents, limitation on the number of expert witnesses, the reference of preliminary issues to a master for findings to be used as evidence at trial by jury and such other matters as may be proper.⁶⁹ This rule, almost to the word, has been adopted in various states.⁷⁰

Such pre-trial rules permit the court to enter orders which are binding on the parties throughout the balance of proceedings. Though this feature has been the basis for constitutional objection on the theory that the parties are partially deprived of trial by jury, this objection has been rejected by the courts.⁷¹ The pre-trial order is considered merely a condition to, and not an abrogation of, the right of jury trial.⁷²

Many judges use the pre-trial conference to explore a basis for settlement. There are, however, no appreciable guidelines delineating what is the proper extent of that exploration. Although the scope of the conference is certainly broad, it is by no means without limitation. The court, for example, cannot use the pre-trial conference to coerce a settlement. In *People ex rel. Horwitz v. Canel*,⁷³ the Illinois Supreme Court reversed the trial court's pre-trial order. The suit was against a hospital and was instituted before the doctrine of charitable immunity was abolished in Illinois.⁷⁴ The hospital carried liability insurance of \$50,000 and contended that the balance of its funds was in trust and not subject to the satisfaction of a judgment. The insurer waived defense and tendered the \$50,000 to the plaintiff who refused to accept it. The pre-trial order stated that if the plaintiff was awarded a verdict in excess of \$50,000 and could not find non-trust funds from which to satisfy the excess, the hospital's attorneys' fees and the expenses of litigation would have to be paid out of the \$50,000 of insurance. In holding that the trial court exceeded its authority under pre-trial rules, the court said:

67 One commentary on Federal Rule 16 states that [a]lready there has been enough experience with the pretrial hearings in the federal courts to make it clear that [the] Rule . . . is capable of substantially contributing to the efficiency of federal practice. Sunderland, *The Function of Pre-Trial Procedure*, 6 U. PITT. L. REV. 1, 4 (1939).

68 4 AM. JUR. TRIALS 662 (1966).

69 FED. R. CIV. P. 16. The purpose of pre-trial conferences is the same under both the federal and state rules, that is, to reduce expense and delay during trial. 4 AM. JUR. TRIALS 662 (1966).

70 *E.g.*, ILL. SUP. CT. R. 218(a).

71 *State ex rel. Kennedy v. District Ct.*, 121 Mont. 320, 194 P.2d 256 (1948); Annot., 2 A.L.R.2d 1061 (1948).

72 *State ex rel. Kennedy v. District Ct.*, 121 Mont. 320, 327, 194 P.2d 256, 260 (1948).

73 34 Ill. 2d 306, 215 N.E.2d 255 (1966).

74 The charitable immunity doctrine was abolished in Illinois by *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

Rule 22 [the pre-trial conference rule] limits a trial court's jurisdiction on pretrial, and nothing in the rule authorizes coercion of a party into settlement in an amount arbitrarily fixed by the court or the imposition of sanctions on a party who refuses to settle.⁷⁵

Even if a settlement is not realized, the pre-trial conference may still be advantageous. It is probably more far reaching than any other suggestion for streamlining the jury trial, and when properly used, it greatly expedites the process of litigation.⁷⁶ The success of the pre-trial conference, however, is totally dependent upon the manner in which it is conducted. One court, for example, actually set up fifty cases for pre-trial in one day.⁷⁷ Under such circumstances, pre-trial can lose its effectiveness and easily assume a circus atmosphere, with bailiffs stationed throughout the courtroom, several judges assembled in different chambers, numerous attorneys milling about the courtroom, and the court clerk acting as a traffic director by calling cases and directing the responding attorneys to a particular judge's chamber. The attorneys, files in hand, then go before the judge and are asked whether the case can be settled. Upon giving a negative reply, they are promptly shuffled out as the judge puts the case on the jury trial docket. Contrast such a parody with the effective pre-trial conference where memoranda are required from all parties. The judge then reviews the memoranda and clearly states the issues. He follows this with an inquiry as to what elements of the case are in controversy. An order finding facts on elements which are not disputed and exploring evidence to be presented on controverted matters is then entered, thus relieving counsel of many unnecessary burdens at trial.

Trial time can also be saved by the identification and marking of exhibits at the pre-trial conference. If amendment of pleadings is necessary, it too can be accomplished there. Finally, the court can, by private conferences with counsel, determine how far apart the respective parties are from settlement. Through his offices of persuasion, but not coercion, the judge can then endeavor to bring the parties together or at least lay ground work so that the parties themselves may work toward settlement. So conducted, the pre-trial is most effective.

4. Certificate of Readiness

In a further attempt to encourage settlement many courts require certificates of readiness. While forms might vary from court to court, the certificate generally serves as a checklist containing the following assertions: first, that all discovery procedures desired to be used by the party filing the certificate

⁷⁵ *People ex rel. Horwitz v. Canel*, 34 Ill. 2d 306, 309, 215 N.E.2d 255, 256 (1966).

⁷⁶ Pre-trial conferences can cause some undesirable side effects. A pre-trial conference, to be most effective, should be presided over by the judge who ultimately tries the case before the jury. If the conference results in rulings on evidence, limitations on expert witnesses, or amendments of pleadings, continuity ought to be retained. Experience shows, however, that this continuity cannot be retained without problems in scheduling and without a corresponding loss of the presiding judge's availability for actual trials. See H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* 154 (1959).

⁷⁷ While the author no longer practices in the court described, he prudently exercises his prerogative to leave the court nameless.

have been completed or that no discovery is anticipated; second, that settlement negotiation has been pursued unsuccessfully or is not appropriate for stated reasons; third, that the case is ready for trial. Courts employing this type of certificate generally make its filing a pre-requisite to the placement of the case on the trial calendar.

The usefulness of the certificate of readiness as an administrative tool is somewhat delusive. Court administrators might seem to gain ground on backlogs by declaring a case not ready for trial because of failure to file a certificate. This is only a short term gain, however. For the administrator has done nothing but delay the date on which any given case shall be counted as part of the backlog.

Putting aside administrative considerations, the usefulness of the certificate of readiness as a device to facilitate civil jury trials, especially personal injury cases, is questionable. It is merely another filing process, and a court can exercise little control over good faith filing. If such a certificate must be filed before a case can be placed on the jury calendar, nothing would prevent parties from boldly filing a certificate of readiness, disclaiming any intention of pursuing discovery and stating that settlement is not possible and that they are ready for trial. The case would start on its course toward ultimate jury consideration without any beneficial results having been achieved.

A study of the effectiveness of the certificate of readiness has been made. Its conclusion, as far as civil jury cases are concerned, is that the certificate of readiness is ineffective. This is unfortunate, for the great backlog of cases is in civil jury matters. The general calendars, which cover all other cases, are not so burdened. However, the empirical study of the effect of the certificate of readiness concluded that

[t]he personal injury suits pending at the time the certificate was introduced have practically all remained on the calendar. But the general cases show a surprisingly high loss ratio: Roughly only 60 out of every 100 cases remained on the calendar.

We must conclude then that the certificate, while it hardly affected the proportion of personal injury filings, has impressively increased settlement of general cases prior to filing.⁷⁸

The pre-trial conference with a pre-trial memorandum is more time consuming than the mere filing of a certificate but it is also more effective in achieving what the certificate purports to do.

5. Interest On Judgment

The traditional rule concerning interest on money judgments, normally declared by statute, is that interest on unliquidated amounts in controversy does not accrue until there is a judgment in a certain amount. The theory has been proffered that if interest began to accrue sometime before judgment, defendants who would otherwise attempt to discourage a worthy plaintiff by dragging the

78 H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *supra* note 76, at 157-61.

case to the rear of an overcrowded docket might be induced to settle. This theory, together with a questionable extension of it, was recently adopted by the Michigan legislature in a statute that provides:

Execution may be levied for interest on any money judgment recovered in a civil action, such interest to be calculated from *the date of filing the complaint* In the discretion of the judge, if a bona fide written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered and the offer of settlement is substantially identical or substantially more favorable to the prevailing party than the judgment, then no interest shall be allowed beyond the date the written offer of settlement is made. (Emphasis added.)⁷⁹

By its flexibility in permitting or denying interest, this statute attempts to equalize the pressures on both plaintiff and defendant. This equalization, while it may seem only equitable, may be a defect preventing the statute from actually encouraging settlements. No uncertainty is removed from the evaluation of a case. It is simply perpetuated or increased.⁸⁰

This interest manipulation, moreover, has little effect in cases involving small amounts of money, which make up the majority of tort cases. For example, if the interest rate is five percent and the verdict \$2,000, assuming that three years elapse from the date of filing the complaint to the date of judgment, plaintiff would be entitled to an additional \$300. Thus, in the vast bulk of tort cases, the increment in interest assumes a comparatively insignificant position.⁸¹

The interest rule does not accomplish what its advocates had hoped for in terms of encouraging settlements of law suits. In fact the evidence available at the present time would indicate little, if any, achievement in this regard.⁸²

79 MICH. STAT. ANN. § 27A.6013 (Supp. 1965).

80 Some courts have employed the concept of interest from date of filing or date of injury without legislative fiat. For instance, in actions pursuant to death on the high seas and under the Jones Act, the interest rule was so applied as a part of "fair and just compensation for pecuniary loss sustained." 46 U.S.C.A. §§ 688, 762 (1958). See *Noel v. United Aircraft Corp.*, 342 F.2d 232, 240 (3d Cir. 1965) (relating to death on high seas); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959). See also *Gardner v. National Bulk Carriers, Inc.*, 333 F.2d 676 (4th Cir. 1964). The theory of applying the interest rule is different in the foregoing cases, but they do illustrate that the rule might be applied without legislative action.

81 This judgment is appropriate only in relation to the interest rule and its purpose of facilitating settlement. It is not appropriate to the substantive considerations which hold that an injured party, as a matter of right, ought to be paid interest from the injury or date of filing the complaint.

82 A comparison of the number of suits filed in Massachusetts, which adopted the interest rule in 1947, and Connecticut, which had not adopted the rule, casts doubt on the efficacy of such a rule as a device for reducing the number of trials. Statistics indicated that Massachusetts experienced a decline in the filing of new lawsuits up to the date the interest rule was adopted. A year after the interest rule was adopted, however, the ratio of new suits to claims increased. The state of Connecticut, used by the researchers as a control state, also showed a decline in the number of suits filed compared to the number of claims made up to 1947. However Connecticut also noted an increase in this ratio for the year 1948, and this ratio was comparable to the increase noted in Massachusetts. Commenting on the statistics gathered, the researchers concluded:

Hence, it is doubtful whether the Massachusetts figures actually show an effect of the changed interest rule. But, and this is important, if it shows such an effect it is in the negative direction of increasing rather than of relieving the workload of the Court. To be sure more suits do not necessarily mean more trials, but they certainly do not mean fewer trials. Given, then, the most favorable interpretation, . . . [the statistics indicate] no effect of the new interest rule on the workload of the courts. H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *supra* note 76, at 129-30.

C. Conducting the Trial

Methods or techniques that can be utilized for the modernization of the civil jury trial itself are: split trials, restricting attorneys on *voir dire* and the use of uniform or pattern jury instructions.

1. Split Trials

The split trial is one of the more promising devices to modernize the contemporary civil jury system.⁸³ Its flexibility can result in a great saving of time and a more expeditious disposition of jury cases. However, with the exception of the Federal Court system, it is still largely a promise.

The power of a court to exercise its discretion in ordering a separate trial of various issues comes from either court rules or legislation. The applicable Federal Rule reads:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, . . . or of any separate issue or of any number of claims . . . or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.⁸⁴

Under this Federal Rule, and similar state rules, split trials have been justified in the following situations: where the issue of liability is a separate and distinct question from damages, where a split trial will not operate to the prejudice of any party to the action and where a split trial will expedite litigation or lessen its costs. When any of these situations exist, it is generally within the trial court's discretion to order the split trial.⁸⁵

Not all jurisdictions subscribe to the federal position on split trials in personal injury cases. The Texas Supreme Court, for example, held that a Texas statute, similar to the prior Federal Rule,⁸⁶ did not permit the trial court to separate the issue of liability from the issue of damages. It reasoned that to hold otherwise would allow piecemeal litigation of a single controversy. The court also felt that the issues of liability and damages are so inextricably combined in personal injury cases that they could not be severed for trial.⁸⁷

There is some merit to the Texas court's position. Splitting liability and damage issues for purposes of trial can present problems. Assuming that a trial court splits the issues and that the plaintiff is successful on the liability issue,

⁸³ The term "split trial" refers to the power possessed by some courts of severing liability issues from the question of damages and of dividing multiple claims and cross-claims in a multiple party case.

⁸⁴ Fed. R. Civ. P. 42(b).

⁸⁵ *Nettles v. General Accident Fire and Life Assurance Corp.*, 234 F.2d 243, 247 (5th Cir. 1956); *Chudyk v. Fifth Ave. Coach Line, Inc.*, 6 App. Div. 2d 1003, 177 N.Y.S.2d 981, 982 (1958).

⁸⁶ Prior to its amendment in 1966, Federal Rule 42(b) read:

The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counter-claims, third-party claims, or issues. 28 U.S.C. Rule 42(b) (1964).

⁸⁷ *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648 (1958).

there arises the problem of deciding what jury is to hear the evidence on damages. Should the same jury that decided the liability issue hear this evidence, or should an entirely different jury assess damages? In answering this question, one must recognize that the whole purpose of the split trial is to save time. If a different jury is to determine damages, a second *voir dire* will be necessary, and valuable time will be consumed, contrary to the very purpose of the split trial. In *O'Donnell v. Watson Brothers Transportation Company*,⁸⁸ a federal district court held that the decision to impanel a new jury to determine damages lay within the trial court's discretion.⁸⁹ The court said, however, that using the same jury which determined liability to hear damages should be preferred because it is a more "expeditious, economic and less time-consuming procedure."⁹⁰ Where the same jury is to be used, the court stated, the initial *voir dire* examination by counsel should cover damages as well as liability.⁹¹

Counsel for either plaintiff or defendant may be wary of the split trial. However, the attorneys for the plaintiff are generally the more vociferous in their objections to it, because of their belief that evidence of the injury, pain, and suffering sustained by the plaintiff will influence the jury to render a favorable verdict. The closer the question of liability, the more crucial this element of inherent sympathy for the injured party becomes. Plaintiff's counsel can also be expected to resist the split trial in cases where the liability issue is hotly contested by arguing that the issue of liability is too intertwined with the issue of damages to be tried separately. This argument has been recognized by the courts when considering whether a case should be remanded for a new trial on damage issue only.⁹²

The propriety of splitting issues may be difficult to determine in cases where the liability issue is close, but this should not dissipate the value of the technique and certainly should not deter courts from adopting the procedure. The pre-trial conference is an appropriate time and means to explore the advisability of splitting the issues for trial.

2. Jury *Voir Dire*

After being summoned for service, the juror is tested on his qualifications during the *voir dire*. The problems involved in this area are: who should interrogate the jury, the judge or counsel; and the number and method of exercising challenges.

The old method of jury examination was extremely time consuming. This examination was counsel's first opportunity to begin "working on" the jury, and, under a more or less hands-off policy by the court, he began his explanation of the theory of his case during his "examination" of the jurors. This type of examination usually resulted in the attorney making a final argument and then rejecting by peremptory challenge those jurors who did not seem to respond properly to it.

Modern practice stands in marked contrast. Many states now have statutes

88 183 F. Supp. 577 (N.D. Ill. 1960).

89 *Id.* See also *Hassett v. Modern Maid Packers, Inc.*, 23 F.R.D. 661 (D. Md. 1959).

90 *O'Donnell v. Watson Bros. Transp. Co.*, 183 F. Supp. 577, 580 (N.D. Ill. 1960).

91 *Id.*

92 *Id.*

similar to Illinois Supreme Court Rule 234,⁹³ which requires the judge to initiate the *voir dire* by identifying the parties and their counsel and by giving a brief outline of the case. The rule also requires that the judge, not counsel, question the jurors as to their qualifications. After the judge has completed these preliminaries, he may then give counsel a reasonable opportunity to ask the jurors questions concerning their qualifications. The rule admonishes court and counsel that no questions on law instructions are to be permitted.

Under Federal Rule 47 the judge can employ either of two different methods on *voir dire*. He may examine the jurors concerning their qualifications himself, or he may permit counsel to do so. If the court elects to conduct the examination, counsel must be permitted to make further "proper" inquiry. In lieu of permitting counsel to ask additional questions, however, the court can require the attorneys to submit questions to him, and then he, in turn, can ask the questions of the prospective jurors. In this manner, the court retains a tight control over the questioning process.

Modern practice considerably limits the number of peremptory challenges available to each side. The amount of time required of court and counsel to select a jury is thus shortened. Illinois, a typical example, limits peremptory challenges in civil cases to five per side.⁹⁴ When there are multiple parties on a side, the court may allow up to three additional peremptory challenges per party, with each side of the case — as opposed to each party in the case — having an equal number of peremptory challenges.⁹⁵ This requires a sharing of challenges among multiple parties. Finally, Illinois permits an additional peremptory challenge for every alternate juror, but this additional challenge may be used only in the selection of the alternate juror.⁹⁶

In view of the limited number of peremptory challenges, the manner in which a panel of jurors is selected is crucial. Juries are selected from panels of three, four, six or twelve. Obviously, if the court requires counsel to choose a jury from panels of three or four, counsel must exercise his peremptory challenges before accepting the panel; this decision is often difficult. Tactically, counsel does not like to exhaust his peremptory challenges on one or two panels but prefers to reserve some for later panels.

Permitting counsel to interrogate all twelve prospective jurors, or having the court do so, before requiring the exercise of any challenges makes sense. For it permits a more intelligent employment of the peremptory challenge. Rather than being forced to make a piecemeal decision, perhaps leaving on an earlier panel a juror that he would otherwise have excused if that juror had been on the final panel interrogated, counsel can evaluate each juror relative to the entire panel. Furthermore, permitting an examination of all twelve jurors before requiring the exercise of challenges should not result in a more lengthy *voir dire*. For the length of the jury examination will largely be controlled by the court under the modern practice. And the court will not have any less control where it permits an examination of a panel of twelve jurors as opposed to a panel

93 ILL. SUP. CT. R. 234.

94 ILL. REV. STAT. ch. 110, § 66(1) (1956).

95 *Id.*

96 *Id.* at § 66(2).

of three or four. The twelve-man panel thus permits a more intelligent selection of the jury.

3. Instructing the Jury

The primary function of the jury is to decide questions of fact and to render a verdict by applying the law to the litigants' conduct. Instructing the jury on the law applicable to the case before them is, therefore, crucial to their ultimate function. Improper instructions will almost invariably result in reversals.

The old practice of preparing instructions without any guide other than past court opinions resulted in a morass of legal sophistry. Instructions became merely another vehicle for spreading the advocate's theory of particular cases rather than for conveying a distilled principle of law. The instructions were complex, often nonsensical and almost uniformly boring. It is not surprising that jurors found them confusing. A look at the reports of appellate courts discloses just how confusing these instructions could be. Illinois' committee on jury instructions conducted a study spanning 25 years and found that thirty-eight percent of all cases reversed on appeal from 1930 to 1955 were reversed in whole or in part because of erroneous instructions.⁹⁷ This percentage represents a staggering number of man hours, not only at the appellate level, but also at the trial level.

Efforts have been made throughout the United States toward uniformity in jury instructions. The movement was initiated in California,⁹⁸ and, as of April, 1966, uniform jury instructions were being used, either optionally or mandatorily, in 22 of the states.⁹⁹ The objective of the uniform or pattern jury instructions is to achieve simplicity and economy of time in both the preparation of instructions and the conference on instructions. These uniform instructions also achieve what their name implies, uniformity from one case to the next in matters of law.¹⁰⁰

Committees on uniformity try to avoid changing the law in new instructions. Regardless of the care taken, however, some of the uniform instructions have done exactly that. In Illinois, for example, prior to the adoption of the pattern jury instructions, it was considered error to instruct the jury on the meaning of "intoxication" in dram shop cases.¹⁰¹ Nevertheless, the committee drafting uniform instructions prepared a definition of the word "intoxicated," while acknowledging that the instruction had not been previously approved.¹⁰² Regardless of occasional overstepping of traditional procedures, the uniform or pattern jury instructions generally are the result of a cautious and concentrated

97 ILLINOIS PATTERN JURY INSTRUCTIONS xi (1961).

98 6 AM. JUR. TRIALS 929 (1966).

99 *Id.*

100 The aim of the drafters of the instruction was to make them conversational, understandable, unslanted and accurate. ILLINOIS PATTERN JURY INSTRUCTIONS xiii (1961).

101 *Shea v. LaCost*, 16 Ill. App. 2d 454, 458, 148 N.E.2d 484, 486 (1958).

102 The instruction was presented to the Illinois Supreme Court, adopted by it and later given the court's blessing by case decision. *Woolley v. Hafner's Wagon Wheel, Inc.*, 22 Ill. 2d 413, 420, 176 N.E.2d 757, 760-61 (1961). The appellate court held, in *Navarro v. Lerman*, 48 Ill. App. 2d 27, 36, 198 N.E.2d 159, 163 (1964), "that an instruction defining intoxication is proper in a dramshop case and we hold further that IPI No. 150.15 is a good definition of a term which is difficult to accurately define."

effort by knowledgeable committees. The end product is, from an over-all assessment, beneficial.

IV. Conclusion

The civil jury system has been serving our society for many centuries. It has worked. It admittedly has shortcomings, but so would any system of resolving human disputes. The alternatives to the jury system are bench trials or administrative hearings. These alternatives, however, do not overcome the shortcomings of the jury but merely replace them with similar shortcomings. For example, under the jury system, there is the possibility of a bored jury. However, there is also the possibility of a bored judge or administrator. Though the jury may not be composed of trained experts, the expertise provided by bench trials and administrative hearings is counterbalanced by the danger of judges and examiners who have become calloused by constant exposure to the judicial process. Viewing too many injuries and hearing too many cases can produce a stilted cynicism just as easily as it can produce an economical, inexpensive and rapid determination of private rights.

The argument concerning the retention or abolition of the civil jury has been going on for many years and shall continue. While the argument progresses, so does the civil jury system. Very real modifications have been and will continue to be made in the system. Some of the innovations have greater merit than others, but the important thing is that the awakening has come. It is with these attempts at modernization that the ultimate resolution of the argument will lie. For if the civil jury system can be modernized to the point of efficiency, the inherent desirability of having the citizen from the community measure human conduct and pass judgment on it will prevail.